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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 49

JOSÉ SORIANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

REASON FOR THIS SUPPLEMENTAL BRIEF

On November 13, 1956, the Court, at the suggestion of petitioner,[1] requested both parties to submit briefs on the question of whether petitioner's claim was barred by time as not having been filed within the statutory period. The Government had not heretofore urged in this Court that petitioner's claim was barred nor had the question been raised in the petition for certiorari or in the principal briefs of either side. Petitioner's reason for raising the question himself, and for asking the Court to find that his

[1] The letter to the Court from petitioner's counsel dated November 7, 1956, appears in the Appendix to this brief, p. 60, *infra*.

claim is not barred, is the recent Court of Claims case of *Compania Maritima* v. *United States*, No. 50165, decided November 7, 1956. By this decision the Court of Claims overruled an earlier case and held that a claim of a resident of the Philippines against the United States which accrued during World War II and on which he failed to file suit either within six years of the time when the claim accrued or within three years of the end of the war was barred by the statute.[2] Petitioner fears that even should he prevail on the merits in this Court he would be dismissed by the Court of Claims under the *Compania Maritima* decision. Petitioner has requested that the Court receive briefs and hear argument on the question of whether the claim was filed in time so that if need be it could dispose of both legal issues at the same time.

QUESTIONS PRESENTED

1. Whether and under what circumstances the Court should consider and decide the time limitation issues now raised by the petitioner which were not raised in the petition for certiorari nor considered in this case by the court below.

2. Whether a claim for payment for goods requisitioned by Filipino guerrillas, who were allegedly

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[2] The earlier decision, *Marcos* v. *United States*, 122 C. Cls. 641, motion for new trial denied, 122 C. Cls. 650, one judge dissenting, denied a motion to dismiss, holding that a Filipino claimant could bring suit in the Court of Claims on a claim which accrued over six years earlier during the Japanese occupation of the Philippines. The United States did not seek review in *Marcos*, since the Court of Claims order was interlocutory. The *Marcos* petition was subsequently dismissed on the authority of *Logronio* v. *United States*, 132 C. Cls. 596.

authorized to obligate the United States Government, accrued at the time of the requisitioning or only after a Claims Service of the Army of the United States had disapproved the payment of the claim from funds advanced to the Philippine Government.

3. Whether the United States has consented to be sued on a claim which was not filed within the six-year time period imposed by the statute giving consent to be sued nor filed within the three-year period following the war which is allowed a plaintiff who could not legally bring suit during the war.

STATUTE INVOLVED

28 U. S. C. 2501, 62 Stat. 976, provides in relevant part:[3]

> Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed, or the claim is referred by the Senate or House of Representatives, or by the head of an executive department within six years after such claim first accrues.
>
> * * * * *
>
> A petition on the claim of a person under legal disability or beyond the seas at the time the claim accrues may be filed within three years after the disability ceases.
>
> * * * * *

STATEMENT

This action was brought on April 26, 1951, against the United States in the Court of Claims to recover the value of rice and other supplies which were al-

[3] This statute was amended in 1954 to eliminate the language pertaining to referred claims. 68 Stat. 1246.

legedly requisitioned from petitioner, a Philippine citizen, by Filipino guerrillas during the Japanese occupation of the Philippine Islands in World War II. The facts and allegations which bear on the question of whether the suit was filed in time may be summarized as follows:

The petition in the Court of Claims alleges that at various times, from September 1942 to January 1945, Filipino guerrillas requisitioned or commandeered from petitioner supplies with an aggregate value of $119,765.75. It states that at the time of each taking a receipt was given petitioner "and it was clearly understood and agreed at the time of such commandeering that a legal obligation to pay was created thereby" and that payment would be made by the United States Army (R. 2). Petitioner alleges that his "right to recovery is based on implied contracts arising from the acts of commandeering or on the receipts issued in consequence thereof" (R. 3).

With respect to the date on which the cause of action accrued, a question which petitioner in Part II of his brief seeks to raise in this Court, the petition in the Court of Claims states (R. 4):

> XV. That plaintiff, at the time of the claim against the defendant first accrued, was living in the Philippines and remained there from that time throughout the entire occupation of the Islands by the Japanese military forces during all of which period the American courts were inaccessible to him; that plaintiff since the time the claim first accrued up to the present has never gone, resided or done business in the United States.

American troops returned to the Philippines in October 1944. Manila was liberated in February 1945. Hostilities in the Pacific were over on September 2, 1945. On August 6, 1945, the Army Claims Service was given authority to settle certain types of guerrilla claims, including claims for equipment and supplies provided guerrillas by civilians. The Army Claims Service established an administrative deadline of March 31, 1948, to receive claims which were to be approved for disbursement from the appropriated funds advanced to the Philippine Government. On March 30, 1948, petitioner filed a claim for payment for property which allegedly had been commandeered from him in 1942 to 1945. The claim was disapproved as being without merit by the Claims Service on June 21, 1948. The petition below was filed in the Court of Claims on April 26, 1951. This was six years and three months after the date of the last requisitioning, and was five years and seven months after the end of hostilities.

SUMMARY OF ARGUMENT

I

A. As a general rule, this Court should decline to decide issues not considered by the court below nor raised in the petition for certiorari. In exceptional cases, the Court will consider jurisdictional issues on its own motion or other issues implicit in the case which have not been properly raised.

B. Petitioner has asked this Court to receive briefs and hear argument on the issue of whether the claim

is barred by time—an issue which was not considered by the court below, nor raised by either party in the petition for certiorari or in the briefs originally filed in this Court. Petitioner's justification for raising this issue now is his fear that, even if he should prevail on the issue on which certiorari was granted, he would face the probability of being dismissed in the Court of Claims as not having filed within the statutory period. To avoid this possibility, he has asked the Court to resolve that question in his favor at this time.

Should the Court decide in favor of the petitioner on the issue on which certiorari was granted, the Government agrees that the Court might properly go on to consider the issue now raised. If, on the other hand, the Court should agree with the Government that the case must be dismissed for the reasons considered by the court below, it need not go on to consider the time limitation but may defer consideration of that issue to a case in which it was considered and decided by the court below.

C. The difficulties in this Court's considering an issue which was not properly raised are evident in this case. The questions have not been nicely drawn. There has been no occasion for the narrowing of differences and the meeting of opposing contentions. As a consequence, petitioner's brief on the limitations issue does not even allude to the basic argument on which the Government relies—that the statutory consent to sue the United States cannot be expanded by common law principles or by implication.

II

Before discussing the question of whether the six-year period within which suits must be filed in the Court of Claims was extended by virtue of the war, petitioner advances an alternative theory that his claim did not accrue until it was turned down by the Army Claims Service in June 1948. This point was not involved in the Court of Claims' *Compania Maritima* case which formed the basis for petitioner's request that this Court consider the time limitation problem. In fact, a holding for petitioner on this point would remove from the case the general "suspension for war" issue with which *Compania Maritima* deals.

But should the Court wish to consider the point, it is clear from the allegations of the petition below that petitioner's claim accrued no later than January 1945. The submission of petitioner's claim to the Army Claims Service and rejection by it was not a prerequisite to suit in the Court of Claims based upon an alleged taking by the United States. Claims for just compensation arise at the time of the taking, and, unless there is a special statute requiring prior administrative consideration, suits may be filed at once in the Court of Claims. Here, there was no statutory authority requiring consideration by the Army Claims Service; moreover, at the time that the requisitions here allegedly took place, the Army Claims Service had no authority to consider claims of this type. Further, the Army Claims Service was authorized, with respect to claims of this type, only to approve them for payment from funds which the United States had

advanced to the Philippine Government. Finally, petitioner is bound by his pleadings in the Court of Claims, which conceded that the claim "first accrued" during the Japanese occupation.

III

Petitioner does not make clear the legal theory on which he relies in arguing that the statutory period for suits in the Court of Claims is extended as a result of war. Petitioner must contend either that construction of the Court of Claims statute of limitations or some general principle of law outside the statute requires an extension of time for war. We believe that consent to sue the United States after the express statutory period has expired cannot be found on either basis.

A. No common law principle regarding the tolling of limitations can broaden the consent of the United States to be sued. Decisions of this Court prior to *Erie* v. *Tompkins*, applying such a principle to state statutes of limitations, have no bearing on suits against the sovereign which are subject to express conditions and limitations provided by Congress, which may not be relaxed by judicial fiat. No Federal court has knowingly held a common law extension for war applicable to a suit against the United States. Since Congress alone has the authority to determine the basis on which the United States can be sued, an extension of the consent cannot be read by implication into the Court of Claims statute.

B. Nor can the language of the Court of Claims statute be construed as providing an extension for

war. The literal language of 28 U. S. C. 2501 (*supra*, p. 3), which contains no war extension provision, must, as a waiver of sovereign immunity, be strictly construed; and inasmuch as the common law provided no suspension of limitations for war when the statute was first enacted in the early 1860's, Congress at that time could not have intended to incorporate such a provision. Further, Congress has shown, by repeated enactment of Federal limitations which either include expressly or omit suspension provisions for war, that it makes express provisions for such an exception when it means it to be available.

In *Kendall* v. *United States*, 107 U. S. 123, the Court faced the contentions made here by petitioner and decided against them. A supporter of the Confederacy was unable, because of the Civil War and war legislation, to file suit in the Court of Claims during a portion of the six-year statutory period. He contended that he should be allowed six years in which the court was open to him. This Court, pointing out that the United States could not be sued except on the terms to which it had consented, held that the six-year period could not be extended by implication because of the plaintiff's inability to bring suit.

C. The present statute limiting the period within which suits can be filed in the Court of Claims is in no way inequitable for those, like petitioner, whose cause of action accrued at a time when they were denied access to the courts by war. In 1948, the statute was amended so that the special three-year period of grace then applicable to infants and insane

persons would be available to every person who was under a legal disability of any kind which barred his bringing a suit.

That petitioner and others in the Philippines were under a legal disability which prevented their filing suit during the war is clear from the Trading with the Enemy Act. Whether or not petitioner was under any common law disability during the war, this Federal statute imposed a legal disability barring his suit. The Court of Claims has held, and the Government concedes, that the consent to suit statute must be construed as allowing petitioner and others like him a period of three years after that disability was removed. Petitioner did not file within that period, nor within the six-year period after his cause of action accrued. He is not in a position to urge that this three-year period of grace should be read out of the statute.

D. The extension of the consent of the United States to be sued is a matter for legislative action, but were the Court free to read into the statute a judicial exception for war it ought not to do so. Today "war" is not the well-defined concept that it was in the last century. A technical state of war and the practical problem of reaching a court have very little relationship to each other. The problem of those who are legally prevented during war from filing suit was taken care of by the 1948 amendment. Any remaining problem is one of physical inaccessibility of the court. The six-year period is long enough to accommodate most interruptions of that kind. (The entire war here used up less than half of petitioner's six

years computed from the date of the first requisitioning.) Legislative action could deal precisely with any further extension of the consent to sue upon which Congress should decide. A judicial exception would create uncertainty in every other statute establishing a time limitation in actions against the United States.

ARGUMENT

I

THIS COURT SHOULD REACH THE TIME LIMITATION ISSUES ONLY IF IT DECIDES FOR THE PETITIONER ON THE ISSUE ON WHICH CERTIORARI WAS GRANTED

A. AS A GENERAL RULE THE COURT SHOULD AVOID DECIDING ISSUES NOT CONSIDERED BY THE COURT BELOW NOR RAISED IN THE PETITION FOR CERTIORARI

Rule 23, 1 (c) of the Revised Rules of this Court provides that "Only the questions set forth in the petition [for certiorari] or fairly comprised therein will be considered by the court." Rule 40, 1 (d) (2) provides:

> The phrasing of the questions presented need not be identical with that set forth in the jurisdictional statement or the petition for certiorari, but the brief may not raise additional questions or change the substance of the questions already presented in those documents. Questions not presented according to this paragraph will be disregarded, save as the court, at its option, may notice a plain error not presented.

There is no need to expand on these rules nor to argue that the sound administration of justice requires general adherence to them. "Petitioner is not here en-

titled to decision on any question other than those formally presented by its petition for the writ." *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175, 179.

The Court has the power, of course, to consider on its own motion other issues which may be involved in the case, particularly ones relating to its own jurisdiction or the jurisdiction of the court below. Even where such issues are jurisdictional, however, there is no necessity of the Court's deciding them where the case can be disposed of on the merits. Cf. *Brooks* v. *Dewar*, 313 U. S. 354, 359–360; *Secretary of Agriculture* v. *Central Roig Co.*, 338 U. S. 604, 619–620. It is submitted that the practice of first considering the issues raised in the petition for certiorari and then other issues only if necessary to provide substantial justice is well founded. It would be well not to encourage parties to suggest, shortly before oral argument, additional issues which the Court should consider, but which have not been presented or briefed.

B. IF THE COURT SHOULD AFFIRM THE COURT BELOW ON THE ISSUE ON WHICH CERTIORARI WAS GRANTED, THERE WOULD BE NO REASON TO CONSIDER ANY OTHER QUESTION NOW RAISED BY PETITIONER

The petition below was dismissed *per curiam* by the Court of Claims on the ground that petitioner's cause of action, if any, was against the Republic of the Philippines and not against the United States. It was on this issue that certiorari was sought and granted and on which the principal briefs were submitted. On November 7, 1956, petitioner's counsel wrote the Court (Appendix, p. 60, *infra.*) calling its attention to a

decision of the Court of Claims on that date in *Compania Maritima* v. *United States*, No. 50165. The Court of Claims there held that it had no jurisdiction to consider a petition of a Philippine corporation which was filed more than six years after the cause of action accrued and more than three years after the end of World War II. Petitioner feared that if he were successful on the issue on which he requested certiorari, he would be remanded to the Court of Claims, only to be dismissed as being time barred, and would again have to petition for certiorari on that issue. To avoid that possibility, petitioner has suggested that the Court receive briefs and hear argument on whether the claim is barred. This procedure has been adopted by the Court. It places the Court in a position where, if it finds for the petitioner on the basic issue, it can go on and decide the limitations point now, without requiring petitioner to go back through the Court of Claims and again apply for certiorari.

We have no objection to this procedure. We believe that under those circumstances the Court might properly go beyond the issue raised in the petition for certiorari. We do suggest, however, that the orderly procedure is first to consider the issue raised in the petition for certiorari. Should the Court agree with the Government, and with the court below, that the suit must be dismissed on that ground, the Court need go no further. Petitioner, and the other guerrilla claimants in his position, would have no concern with the period within which suits can be filed. If that issue should remain of sufficient importance to require re-

view by this Court, it could be considered in a case where it was decided below and properly raised in this Court.

The effect of the interjection of the time limitation issue into this case provides the Government with a second basis on which it may prevail, in addition to the merits. A decision for the Government on either ground would dispose of all Philippine guerrilla cases now pending in the Court of Claims.* The suggestion we make as to the order in which the issues should be considered is made in the interest of preserving, to the extent consistent with petitioner's interests, the concept of orderly review provided for in the Rules.

C. THE DISADVANTAGES OF CONSIDERING POINTS NOT RAISED IN THE PETITION ARE WELL DEMONSTRATED IN THIS CASE

The hasty insertion of the question of whether the claim is barred by time has meant that the issues here have not been well drawn. Part II of petitioner's brief argues points which the Government concedes and other points which we consider irrelevant to the decision in this case. More serious, in that it deprives the Court of studied comment to which it is entitled, petitioner's brief fails throughout its 46 pages to advert to the issue which we believe controlling, namely, that this is a suit against the United States and that the United States cannot be sued except to the extent that it has *by statute* consented thereto.

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* If all Philippine guerrilla cases were eliminated by a decision here in favor of the Government on the merits, the limitations point would affect comparatively few other pending cases in the Court of Claims.

Whether the six-year period within which the United States has consented to be sued can be extended by implication as a consequence of facts and circumstances not provided for in the statute is a matter which this Court previously considered of sufficient importance to justify a grant of certiorari. *Standard-Vacuum Oil Co.* v. *United States,* 339 U. S. 157. The Court found that the precise issue there raised turned on facts not contained in the record and remanded the cause to the Court of Claims. We believe the issue here to be one of law adequately raised by the pleadings in the court below, but it does not follow that the Court should now decide a question raised as this one is here. The Court might prefer to wait, if it can do so without injury to petitioner, until the point is necessary for a decision, the area of discussion has been narrowed, and the issue sharpened by the normal grinding of the judicial mill.

II

PETITIONER'S CLAIM ACCRUED NO LATER THAN JANUARY 1945

Before reaching the issue decided by the Court of Claims in *Compania Maritima* v. *United States,* No. 50165, decided November 7, 1956—the issue on which petitioner requested the Court to receive supplemental briefs in this case—petitioner turns aside to present an entirely different argument: that his claim for just compensation under an implied contract did not accrue until its denial by the Army Claims Service in 1948.

It must be pointed out that, should the Court agree with petitioner on this new argument, the issue of *Compania Maritima* is not presented by this case. The Court may decide therefore that petitioner is not now in a position to make the argument that his claim did not accrue until long after the war; that having suggested by his letter to the Court of November 7, 1956 (Appendix, p. 60, *infra*), that this case is controlled by the *Compania Maritima case,* and having asked the Court to receive briefs and hear argument based on that assumption, he is not free now to contend that that issue is not presented. Since we believe, however, that the point has no merit whatever, and that a decision for petitioner on the issue on which certiorari was granted would in fact raise the *Compania Maritima* problem, we do not oppose the Court's consideration of this point. We do suggest that this issue has reached the Court while the door was opened for a worthier and more general issue.

Petitioner's contention made in Point A of his brief (Pet. Br. II, pp. 14–19) is that his claim for property allegedly requisitioned from him by the United States Government in 1942 to 1945 did not accrue until 1948, when an Army Claims Service, to which he had applied three months before, disapproved payment of that claim with funds advanced to the Philippine Government. We believe that the cause of action accrued no later than the date of the last requisitioning, and that in his petition in the Court of Claims petitioner conceded this to be the fact.

1. The petition in the Court of Claims alleged a right of recovery "based on implied contracts arising from the acts of commandeering or on the receipts issued in consequence thereof" under the Fifth Amendment (R. 3). The petition in the Court of Claims also alleged that the claims "first accrued" during the Japanese occupation of the Philippines and during the period when the American courts were closed to the petitioner (R. 4). Thus, the petition both recognized and relied upon the well established principle that a claim based upon the requisition of property accrues at the time of the taking or the delivery of the property to the United States. *United States* v. *Dickinson,* 331 U. S. 745; *United States* v. *North American Co.,* 253 U. S. 330; *United States* v. *Berdan Fire-Arms Co.,* 156 U. S. 552, 570–572.

2. This Court has held that the existence of an alternative administrative remedy does not foreclose an immediate suit in the Court of Claims. *Smithmyer* v. *United States,* 147 U. S. 342, 357–358. Petitioner argues now for the first time in this proceeding that his claim for supplies furnished to Filipino guerrillas did not accrue until it was disapproved by the Army Claims Service in 1948. It is well settled, however, that the existence of an administrative remedy does not prevent accrual of a claim unless exhaustion of the remedy is a prerequisite to judicial relief.

The Army Claims Service was established in the Philippines to handle miscellaneous claims against the Army of the United States and the Government arising out of American military operations. At the time a number of petitioner's claims allegedly arose, the Service had no authority to pass upon claims

arising from guerrilla procurment. It was not until August 1945 that General MacArthur authorized the Service to process such claims for payment by the Philippine Government out of funds advanced for the Philippine Army by the United States.

What was the status of petitioner's claim between January 1945 and August 1945? At that time there was no administrative procedure available, let alone one required by law. Petitioner certainly does not contend that he did not then have a claim that had accrued against the United States. Nor does he admit that, if General MacArthur had never given the Claims Service authority to consider his claim, he would never have had a cause of action. What petitioner contends is that his claim is based upon the Fifth Amendment to the Constitution and the obligation of the United States to pay for goods that are requisitioned in its name. General MacArthur's order, or its absence, could not deprive or postpone the jurisdiction of the Court of Claims over such a claim.

Furthermore, it is not without significance that in reviewing guerrilla procurement claims the Claims Service did not actually pass upon claims against the United States, but only upon claims against funds supplied by the United States to the Philippine Government for payment by that Government. Hence, it is highly unlikely, even in the abstract, that application to the Service would have been a prerequisite to a suit, not against the Philippine Government, but directly against the United States.

Consistently the Court of Claims has held that guerrilla requisition claims arose and accrued at the time

of taking, regardless of whether or not they were first submitted to and passed upon by the Army Claims Service, since the administrative remedy was not a prerequisite to bringing suit. *Tan* v. *United States,* 122 C. Cls. 662, certiorari denied, 344 U. S. 895; *Arribas* v. *United States,* 124 C. Cls. 553. See also *Howard University* v. *Cassell,* 126 F. 2d 6, 9–10 (C. A. D. C.), certiorari denied, 316 U. S. 675; *Southern Pacific Co.* v. *United States,* 67 C. Cls. 414–422, certiorari denied, 280 U. S. 567; *Ylagan* v. *United States,* 101 C. Cls. 294; *Gray* v. *United States,* 124 C. Cls. 313.

The logic of this rule requires little justification, for otherwise claimants would be given an "option as to when they will choose to start the period of limitation of an action against the United States," *McMahon* v. *United States,* 342 U. S. 25, 27, a result clearly repugnant to the policy of repose underlying the statute.

3. None of the cases cited by the petitioner support the proposition advanced by him. *Dino* v. *United States,* 119 C. Cls. 307, on which petitioner appears to place chief reliance (Pet. Br. II, pp. 14, 18), decided only that a petition filed in the Court of Claims seeking compensation in Philippine pesos for supplies furnished Filipino guerrillas did not state facts sufficient to establish a cause of action based on contract or a Fifth Amendment taking. *United States* v. *Clark,* 96 U. S. 37, *United States* v. *Smith,* 105 U. S. 620, and *Scott* v. *United States,* 18 C. Cls. 1, were suits by government disbursing officers for relief from responsibility for loss pursuant to 28 U. S. C. 1496, in which

it was held that such a cause of action accrues when the officer is held accountable for the loss, not when the loss occurs. Finally, *United States* v. *Taylor*, 104 U. S. 216, held that limitation on a claim against the surplus proceeds of a tax sale held by the Secretary of the Treasury in trust for the owner of land, in contemplation of the statute and by analogy to trust doctrines, began to run only on demand against the Secretary.

4. Petitioner's pleadings admit that his claim accrued in or before 1945. His petition in the court below states (R. 2–4):

* * * * *

> VIII. That at the time the various foodstuffs and food supplies, equipment, goods and merchandise in Exhibit "A" were commandeered corresponding receipts were issued to the plaintiff and it was clearly understood and agreed at the time of such commandeering that a legal obligation to pay was created thereby and that payment would eventually be made by the U. S. Army of which said unit was an authorized element;
>
> * * * * *
>
> XIII. That the plaintiff's right to recovery is based on implied contracts arising from the acts of commandeering or on the receipts issued in consequence thereof;
>
> * * * * *
>
> XV. That plaintiff, at the time of the claim against the defendant first accrued, was living in the Philippines and remained there from that time throughout the entire occupation of the Islands by the Japanese military forces

> during all of which period the American courts were inaccessible to him; that plaintiff since the time the claim first accrued up to the present has never gone, resided or done business in the United States;
>
> * * * * *

The only fair reading of this language, we believe, is that petitioner was asserting a claim based on an implied contract in a Fifth Amendment taking during the Japanese occupation of the Philippines, and that an essential element in his complaint was the assertion that the claim *accrued* during the period of the Japanese occupation prior to the liberation of Manila in February 1945, a period during which petitioner was denied access to the American courts.

We submit that in the present posture of the case, petitioner should be bound by his pleadings. He should not be free to raise in this Court at this stage an issue which was (1) not raised by the pleadings, (2) not decided by the court below, (3) not raised in the petition for certiorari, and (4) not raised in his letter of November 7, 1956, requesting the Court to consider the issue in *Compania Maritima*.

III

THE UNITED STATES HAS NOT CONSENTED TO BE SUED ON THIS CLAIM WHICH WAS FILED MORE THAN SIX YEARS AFTER IT ACCRUED AND MORE THAN THREE YEARS AFTER THE END OF THE WAR

Part II of petitioner's brief fails to make clear the legal theory on which he relies in contending that the

statutory period for suits in the Court of Claims is extended as a result of war. The brief refers on one hand to a "rule of common and public law" (Pet. Br. II, p. 28), and on the other hand to what "Congress intended" (Pet. Br. II, p. 45). There is no objection to petitioner's relying on alternative theories, but if the statutory period of consent to suit in the Court of Claims is extended for those who, for a time, are precluded by war from bringing suit, it must be either by virtue of some principle of law outside the statute, or by construction of the statute itself, 28 U. S. C. 2501, *supra*, p. 3. It is not contended that there is any other federal statute which amends 28 U. S. C. 2501, or which specifically confers upon those in petitioner's position the right to sue after the six-year period has expired. In these circumstances, there is no third alternative available. The right he seeks must either be conferred upon him by non-statutory law, or it must be found in the construction of Section 2501. It is our position that consent to sue the United States after the express statutory period has expired cannot be found in either way.

A. NO NON-STATUTORY PRINCIPLE OF COMMON LAW CAN BROADEN THE CONSENT OF THE UNITED STATES TO BE SUED

1. *Hanger* v. *Abbott and succeeding cases were based on the theory of a general public law applicable in all states; a theory which has now been abandoned*

The keystone of any argument that a time limitation is suspended during war is the decision of this Court in *Hanger* v. *Abbott*, 6 Wall. 532. That case, and a number of decisions which followed it, form

the sole basis for any statement that there is a common law rule that periods of limitations are suspended as between opposing belligerents during war. When the reasoning of these cases is examined, they will be seen to have arisen out of the special circumstances of the Civil War and to be based on the principle of a general federal common law which this Court has abandoned since *Erie* v. *Tompkins*, 304 U. S. 64. At most, the cases represent a view of the common law which would have no bearing on suits against the United States, which must be based on a statutory exception to the common law.

Hanger v. *Abbott* was a suit filed in 1865 in the Federal court in Arkansas by a New Hampshire plaintiff against an Arkansas debtor on a cause of action arising in 1859. The applicable Arkansas statute of limitations was three years. On June 11, 1864, Congress had passed a statute providing:

> That whenever, during the existence of the present rebellion, any action, civil or criminal, shall accrue against any person who, by reason of resistance to the execution of the laws of the United States, or the interruption of the ordinary course of judicial proceedings, cannot be served with process for the commencement of such action or the arrest of such person, or whenever, after such action, civil or criminal, shall have accrued, such person cannot, by reason of such resistance of the laws, or such interruption of judicial proceedings, be arrested or served with process for the commencement of the action, the time during which such person shall so be beyond the reach of legal

> process shall not be deemed or taken as any part of the time limited by law for the commencement of such action [13 Stat. 123].

Rather than rely on this statute (which the court later found valid and applicable in such circumstances, *Stewart* v. *Kahn,* 11 Wall. 493; *United States* v. *Wiley,* 11 Wall. 508), the Court treated the issue as one to be decided on broad principles of law.

The Court pointed out that the English statute of 21 Jac. 1, c. 16, of 1623, on which most American statutes of limitations were based, had no exception for war, but that at the time it was adopted debts due an alien enemy were subject to confiscation. It found that such a rule was "condemned by the enlightened conscience and judgment of modern times" (6 Wall. at 536), and that the better view of international law was merely to prohibit an enemy alien from collecting any debts or filing suit during the course of the war. Since during the war the enemy creditor was rendered incapable to sue, "it necessarily follows that the operation of the statute [of limitations] is also suspended during the same period" (6 Wall. at 542).

A prime consideration which appears to have influenced the court in *Hanger* and to which it referred in subsequent cases, *Stewart* v. *Kahn,* 11 Wall. 493, 507; *United States* v. *Wiley,* 11 Wall. 508, 514, was that the Court would not countenance a situation in which those disloyal to the Union would be absolved of their debts as a consequence of their disloyalty:

> Unless the rule be so, then the citizens of a State may pay their debts by entering into an insurrection or rebellion against the govern-

> ment of the Union, if they are able to close the courts, and to successfully resist the laws, until the bar of the statute becomes complete, which cannot for a moment be admitted [6 Wall. at 542].

It is apparent that the Court did not look at the Arkansas statute or to the decisions of the Arkansas state courts. On the contrary, as this Court later stated in explaining the decision in *Hanger* v. *Abbott*, the question was dealt with:

> * * * as one of public and international law, upon which this court is never obliged to accept the opinion of the state courts [*Bauserman* v. *Blunt*, 147 U. S. 647, 654].

The extent to which the Court at that time considered itself free to ignore the views of a state court in interpreting a state statute of limitations is indicated in *Levy* v. *Stewart*, 11 Wall. 244. There the Supreme Court of Louisiana had repeatedly held that the five-year prescription period on bills and notes was not suspended for war or other causes. This Court, finding that "the reasons assigned for the conclusion are not satisfactory," applied the rule of *Hanger* v. *Abbott*.

The very strangeness of this treatment of the decisions of a state court demonstrates how different the jurisprudence on which those cases were based from that governing the Court today. At the time of *Hanger* v. *Abbott*, the Court viewed the common law principles on which that decision was based as principles of general applicability throughout the country, without regard to state laws, or even federal

statutes.' Today *Hanger* v. *Abbott* is not federal law; in this field the statement in *Erie* v. *Tompkins,* 304 U. S. 64, 78, is correct: "There is no federal general common law." Since *Erie* v. *Tompkins,* the decision in *Hanger* v. *Abbott* must be considered at most as a post-Civil War view as to what the law of Arkansas ought to have been.

2. The principle of Hanger v. Abbott has not been held applicable to a suit against the United States

Because *Hanger* v. *Abbott* and the cases which followed interpret state statutes of limitations in the light of an all pervading Federal common law long since repudiated by this Court, they have no bearing on suits on rights created by Federal statute or on suits against the United States in the Court of Claims.

Before considering the question of suits against the United States, it may be well to consider and lay to one side cases applying the *Hanger* v. *Abbott* common law doctrine to suits between private individuals where the right is created by statute.

Where the right is created by state statute, the question today is one of the interpretation of state law. Some states hold that where a time limit goes to the substance of the right involved it is not tolled by war conditions. See *Poccardi* v. *Ott,* 83 W. Va. 166, 98 S. E. 69, and cases cited, annotations, 132 ALR 317, *et seq.;* other state cases have held limitations sus-

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[1] The *Protector,* 9 Wall. 687, allowed *Hanger* v. *Abbott* to extend the time allowed by the Judiciary Act of 1789, as amended, to appeal to this Court from a circuit court. In *United States* v. *Wiley,* 11 Wall. 508, the common law principle was held to extend the time within which the United States could pursue a statutory remedy on a marshal's bond.

pended during war as to both the right and the remedy, *e. g., Siplyak* v. *Davis,* 276 Pa. 49, 119 Atl. 745; and one federal court prior to *Erie* v. *Tompkins,* in considering a state death statute, applied the *Hanger* v. *Abbott* doctrine in a suit between private parties. *Borovitz* v. *American Hard Rubber Company,* 287 Fed. 368 (N. D. Ohio, 1923).

The better rule, where both the right and remedy are part of a single statutory instrument, is exemplified by the Ninth Circuit's decision construing the Alaska Workmen's Compensation Act in which the court properly held that a common law doctrine cannot affect or add to a right which is the creation of a statute. The court said:

> The right of action created by the Alaska act is wholly statutory, and must be accepted with all the conditions and limitations imposed by law. * * * This requirement of the statute is absolute and unconditional. If the notice is not served, there is no right of action, and pleas of war conditions, waivers, and estoppels are of no avail [*Rogulj* v. *Alaska Gastineau Mining Co.,* 288 Fed. 549, 550–551 (C. A. 9)].

This holding is consistent with the well-recognized general rule that, where a statute creates a cause of action unknown at common law, a period of limitation in the statute is regarded as a matter of substance limiting the right as well as the remedy. *Engel* v. *Davenport,* 271 U. S. 33, 38; *Central Vermont Ry.* v. *White,* 238 U. S. 507, 511. Filing a complaint within the prescribed period is a condition precedent to recovery, and the cause of action is extinguished after

the running of the period. *A. J. Phillips Co.* v. *Grand Trunk Western Railway Co.*, 236 U. S. 662; *Kansas City Southern Railway Co.* v. *Wolf*, 261 U. S. 133; *Davis* v. *Mills*, 194 U. S. 451; *The Harrisburg*, 119 U. S. 199; *Bell* v. *Wabash Ry. Co.*, 58 F. 2d 569 (C. A. 8); *Zellmer* v. *Acme Brewing Co.*, 184 F. 2d 940 (C. A. 9). Cf. *Standard Oil Co.* v. *New Jersey*, 341 U. S. 428, 432 (fn. 2).

Two federal cases, *Chuchuru* v. *Chutchurru*, 185 F. 2d 62 (C. A. 10); *Salvoni* v. *Pilson*, 181 F. 2d 615 (C. A. D. C.), are cited by petitioner (Pet. Br. II, pp. 26, 27) to support the proposition that all periods of limitation were suspended during World War II by virtue of the common law doctrine of *Hanger* v. *Abbott*. *Chuchuru* involved the application of a Colorado limitation to a right of action not of statutory origin (a suit on a note), and *Salvoni* concerned the question whether a limitation on the right to extend a judgment in the District of Columbia Code could be suspended. Neither case involved a suit against the United States, and neither has any bearing on whether the time period within which the United States has consented to be sued can be extended by implication.*

Only one modern decision in any court has held that a period of limitation provided in a federal statute which creates a substantive right is suspended

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* In two Civil War cases the Court of Claims found petitioners barred by time even if *Hanger* v. *Abbott* were applicable. The short dictum in each case omits mention of the principle that the United States cannot be sued except to the extent it consents thereto. *Sierra* v. *United States*, 9 C. Cls. 224, 230; *Green* v. *United States*, 17 C. Cls. 174, 197.

by virtue of the common law doctrine of *Hanger* v. *Abbott*. *Osbourne* v. *United States, et al.*, 164 F. 2d 767 (C. A. 2). A libel had alleged that the libelant was injured on board a ship operated by a general agent of the United States in December 1941, interned by the Japanese on December 8, 1941, and allowed to return to the United States only in October 1945. The court recognized the general rule that, where a statute creates a cause of action, the period of limitations is a matter of substance limiting the right as well as the remedy. 164 F. 2d at 768–769. Suit was brought in July 1946. The court held in those circumstances that either the two-year period of limitations in the Suits in Admiralty Act (46 U. S. C. 745) or the three-year period under the Jones Act (46 U. S. C. 688, 45 U. S. C. 56) was suspended by virtue of the *Hanger* doctrine, without deciding which statute applied to the action.

It is believed that the decision in *Osbourne* v. *United States* is wrong, and that, where a substantive right is created by Federal statute, the time period involved cannot be extended by virtue of any common law rule, particularly when that right is part of a general consent to suit against the United States.[7] The

[7] The United States did not apply for certiorari in the *Osbourne* case for various reasons, including the fact that the decision came at an interlocutory stage of the proceedings on pleadings which alleged that the libelant was a prisoner throughout the war. The Government preferred to bring the case, which was in conflict with other decisions, to this Court after trial which would disclose that the libelant for about a year had the freedom of the City of Shanghai and could readily have communicated with the United States. The case was dismissed subsequent to the Court of Appeals decision, when the libelant settled for $500.

case is distinguishable, however, since the Court of Appeals did not actually pass upon the applicability of the suspension, as against the United States. Although the United States was a nominal party to the suit, the real parties in interest were the libelant and an underwriter, who was responsible to both the United States and the general agent, American President Lines. Because of this factor, the sole argument advanced to the court was based on the distinction between common law rights and statutory rights. Neither the court, nor the briefs of either party, suggested that the case be considered as one against the United States in which the doctrine of a limited consent to be sued was applicable.[8] The decision, therefore, at most holds that a period of limitation would be suspended by war in suits affecting private rights.

Moreover, in reaching its decision, the court in the *Osbourne* case assumed that "there would be no doubt that a Japanese citizen * * * would have been able to sue for similar injuries." 164 F. 2d at 769. The reasoning of the court was thus based on the assumption that the *Hanger* doctrine would automatically suspend the statute of limitations under the Jones Act for an opposing belligerent, a conclusion which we strongly oppose in this case. We submit that

[8] At the time of the suit, it was assumed that the general agent, and hence the underwriter, was independently liable, whether or not the libel was dismissed as against the United States. Since *Cosmopolitan Shipping Company* v. *McAllister*, 337 U. S. 783, the general agent would not be liable under the Jones Act, and the United States would be the real party in interest.

where rights between private citizens are conferred by a statute which contains a time period within which suit must be filed, the expiration of that time period destroys the statutory right, and that no common law doctrine can extend the right conferred by statute.

Regardless of whether this general proposition is accepted by the Court, the *Osbourne* decision has no applicability to this case. Here, the petitioner is not suing another private individual on a statutory claim but is suing the United States, which at common law was not subject to suit and which can only be sued to the extent that consent has been expressly granted by statute.

3. *Consent to sue the United States is granted only by statute, and is limited by the terms of the statute*

That the United States cannot be sued except to the extent that it confers consent by statute is so well established that no citation is necessary. The point to be emphasized here is that the consent must be by *statute,* not by some general principle of common law. As this Court said in construing the Federal Tort Claims Act, " * * * our reasoning * * * starts from the accepted jurisprudential principle that no action lies against the United States unless the *legislature* has authorized it." *Dalehite* v. *United States,* 346 U. S. 15, 30. [Emphasis added.] In *United States* v. *Shaw,* 309 U. S. 495, this Court pointed out that consent to suit must be given by legislative action, not judicial rule making:

> As a foundation for the examination of that question we may lay the postulate that with-

> out specific *statutory* consent, no suit may be brought against the United States [309 U. S. at 500–501]. [Emphasis added.]
>
> * * * * *
>
> It is not our right to extend the waiver of sovereign immunity more broadly than has been directed *by the Congress* [309 U. S. at 502]. [Emphasis added.]

See also *Moffat Tunnel League* v. *United States,* 289 U. S. 113; *Morrison* v. *Work,* 266 U. S. 481; *Bigby* v. *United States,* 188 U. S. 400.

Hanger v. *Abbott,* as we have already noted, held that the Arkansas limitation period was suspended because hostilities denied a Northern plaintiff access to the Arkansas court. Ten days after that decision, its author, Justice Clifford, wrote the opinion for the Court in *United States* v. *Eckford,* 6 Wall. 484, involving a set-off against the United States in excess of the original claim on which the United States had brought suit. The Court pointed out that jurisdiction could not be exercised in a suit against the United States "unless the plaintiff can bring his case within some act of Congress," 6 Wall. at 488, and held that judgment could not be entered against the United States for the excess of the set-off beyond the original claim. In considering the question of whether the consent to be sued could be broadened by virtue of a common law rule, the Court quoted with favor the following language from *United States* v. *Robeson,* 9 Pet. 319, 324 (6 Wall. at 491):

> This is a question which arises, exclusively, under the acts of congress, and no local law or usage can have any influence upon it.

In view of this language, it is difficult to believe that the Court which issued *Hanger* v. *Abbott* would have applied a common law principle to broaden or extend by implication a statutory consent to be sued in the Court of Claims.

That the doctrine of *Hanger* v. *Abbott* was not applicable to suits against the United States appears to have been clearly recognized by the Court at the very time that it was applying the principle of that case. On January 11, 1875, the Court decided *Ross* v. *Jones,* 22 Wall. 576, holding that the Arkansas statute of limitations was suspended by the Civil War so as to permit a Tennessee plaintiff to file suit more than five years after his cause of action accrued. One week later, on January 18, 1875, the Court decided *Haycraft* v. *United States,* 22 Wall. 81, a case coming up from the Court of Claims in which the petitioner had argued, relying on *Hanger* v. *Abbott,* that he had been prevented by the war and his confederate status from bringing suit earlier on an implied contract to pay for cotton seized by the United States. While the court held that there was no implied promise to pay, its discussion of the time limit on suits in the Court of Claims indicates that it would not apply *Hanger* v. *Abbott* to suits against the United States (22 Wall. at 92):

> The case has been argued to some extent as though it involved the consideration of a statute of limitations. To our minds the question is one of jurisdiction. A sovereign cannot be sued in his own courts except with his consent. This is an action against the United States in

its own Court of Claims. The appellant must, therefore, show that consent has been given to its prosecution. That being done, the jurisdiction of the court is established and he may proceed. Otherwise, not.

It is conceded that the required consent is not contained in the Captured and Abandoned Property Act itself, for the only action there consented to is one to be commenced within two years after the suppression of the rebellion.

It is submitted that the doctrine of *Hanger* v. *Abbott* is a common law principle which has little if any relevance in the federal courts following the decision in *Erie* v. *Tompkins*. As a common law principle, it can have no effect in conferring or extending jurisdiction to sue the United States in the Court of Claims, as this can only be accomplished by act of Congress.

Since permission to file the suit below cannot be based upon a principle of common law, petitioner is left with the argument that Section 2501 of the Judicial Code can be construed to suspend the running of the statutory period during war. We now turn to the question of the construction of that statute.

2. THE STATUTE HERE INVOLVED, 28 U. S. C. 2501, CANNOT BE CONSTRUED TO REACH THE RESULT DESIRED BY PETITIONER

1. *A statute conferring consent to sue the United States is strictly construed*

The statutory time limit on the consent of the United States to be sued in the Court of Claims (28 U. S. C. 2501) reads

> Every claim of which the Court of Claims has jurisdiction shall be barred unless the peti-

> tion thereon is filed, or the claim is referred by the Senate or House of Representatives, or by the head of an executive department within six years after such claim first accrues.
>
> * * * * *
>
> A petition on the claim of a person under legal disability or beyond the seas[9] at the time the claim accrues may be filed within three years after the disability ceases.

Before examining whether 28 U. S. C. 2501 can be construed as petitioner contends, it is well to consider just what that construction is.

In discussing "the correct construction of the statute," petitioner argues that the phrase "during which the Court is open" must be read into the first sentence of the statute (Pet. Br. II, p. 37). In elaboration, petitioner states that it is "clear that Congress intended the statute to mean that every plaintiff is entitled to *six years during which the Court*

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[9] Petitioner does not suggest that the saving provision in the statute for persons "beyond the seas" is applicable to him. Faced with the early cases which had construed this provision in state statutes as eliminating any period of limitation whatever on foreign claims, *e. g.*, *Hopkirk* v. *Bell*, 3 Cranch 454 (suit filed 40 years after date of note); *Hopkirk* v. *Page*, 12 Fed. Cas. 504, F. C. #6697 (C. C. E. D. Va. 1822) (suit filed 43 years after cause accrued); see *Society for the Propagation of the Gospel in Foreign Parts* v. *Town of Pawlet*, 4 Pet. 480, 507 (29 years), it has been consistently held that the "beyond the seas" exception in the Court of Claims statute does not apply to foreigners permanently resident abroad. *Pacifico Co.* v. *United States*, 80 C. Cls. 391; *Obschestwo Wykounskich Metallugicheskich I Mechanicheskich Sawodow* v. *United States*, 89 C. Cls. 541; *Arribas* v. *United States*, 124 C. Cls. 553; See *DeLuca* v. *United States*, 69 C. Cls. 262, 270, certiorari denied, 282 U. S. 862.

is open to him to sue" (*ibid.*). Again, on page 45 of the same brief, petitioner argues that such a construction is what "Congress intended." It follows that petitioner is asserting that Congress intended that there be an implied extension to the consent to suit provided in the Court of Claims statute for whatever period of time that court was closed to a petitioner "because of War or War Legislation" (Pet. Br. II, p. 37).

No principle of law is more firmly established in this Court than that which holds that waivers of sovereign immunity must be strictly construed. When Congress consents to suit being brought against the United States, the limitations and conditions governing such suits are an integral part of the Congressional consent, and must be observed. *Den ex dem. Murray* v. *Hoboken Land and Improv. Co.*, 18 How. 272; *Reid* v. *United States*, 211 U. S. 529; *Choctaw Nation* v. *United States*, 119 U. S. 1; *Munro* v. *United States*, 303 U. S. 36; *Eastern Transportation Co.* v. *United States*, 272 U. S. 675; *United States* v. *Sherwood*, 312 U. S. 584; *McMahon* v. *United States*, 342 U. S. 25. For "no rule is better settled than that the United States cannot be sued except when Congress has so provided" (*Ickes* v. *Fox*, 300 U. S. 82, 96), and the United States' "liability in suit cannot be extended beyond the plain language of the statute authorizing it." *Price* v. *United States and Osage Indians*, 174 U. S. 373, 376; *Eastern Transportation Co.* v. *United States*, 272 U. S. 675, 686. This Court at no time has felt free to read into the language of a Congressional consent exceptions or extensions to the conditions put

by Congress, to comport with its own notion of what obligations the sovereign ought to assume. *Schillinger* v. *United States*, 155 U. S. 163, 166; *Price* v. *United States*, *supra*; *United States* v. *Shaw*, 309 U. S. 495, 502. It has recognized that the Court of Claims statute in particular is "not one of procedure but of jurisdiction whose limits are marked by the Government's consent to be sued," and which must be construed "with that conservatism which is appropriate in the case of a waiver of sovereign immunity." *United States* v. *Sherwood*, 312 U. S. 584, 590–591; *Finn* v. *United States*, 123 U. S. 227; *Kendall* v. *United States*, 107 U. S. 123. Hence, absent any reliable evidence that Congress intended to allow an exception to its six year consent to suit in the Court of Claims other than those expressly mentioned, this Court must assume that no such exception is to be implied, and that the statute must be construed strictly according to its terms.

2. *Congress could not have intended to incorporate in the Court of Claims limitation a doctrine of suspension of limitations during war, since no such doctrine existed when the Act was adopted*

The legislative history of the statute conferring consent to sue the United States in the Court of Claims provides no basis for an implied exception to the time limitation for the benefit of persons precluded by their enemy status from filing suit. 28 U. S. C. 2501 is derived from Section 10 of the Act of March 3, 1863 (12 Stat. 765, 767), which was modeled on and followed closely the 1623 English Statute of

Limitations (21 Jac. I, c. 16). At the time the statute was adopted in 1863, several years prior to the decision in *Hanger* v. *Abbott*, the recognized common law rule, even as between private parties, was that statutes of limitations were not suspended during a war period.[10] Petitioner (Pet. Br. II, pp. 32, 45) recognizes that the statute which Congress adopted was based on the English limitations statute, yet this statute for over 300 years has been construed as not suspended during war.[11] Since we have been unable to find any American case prior to *Hanger* v. *Abbott* which has held that the period in which the courts

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[10] Angell, *Limitations*, 3rd ed. 1854, § 488.

[11] The Limitation Act, 1939 (2 & 3 Geo. VI. c. 21, § 22) repealed 21 Jac. I, c. 16, on which the Court of Claims statute was modeled, but reenacted substantially the same limitation and disability saving provisions. The English statute has always been interpreted as not subject to suspension on any ground, including war, once it has begun to run. *Hornfray* v. *Scroope* (1849) 13 Q. B. 509; *Beckford* v. *Wade* (1805) 17 Ves. 87; 34 E. R. 34, O. C.; *Prideaux* v. *Webber* (1661), 1 Lev. 31. See *Bowring-Hanbury's Trustee* v *Bowring-Hanbury* [1943] Ch. 104, 110. In view of the long-standing interpretation of the English statute, the British Parliament in 1945 enacted a special statute, The Limitations (Enemies and War Prisoners) Act (8 & 9 Geo. VI, c. 16), which expressly provided that statutes of limitations were suspended in suits in which a necessary party was an "enemy or detained in enemy territory". "Enemy" was defined as a person or territory deemed an enemy for the purposes of the British Trading With the Enemy Act of 1939. The 1945 Limitation Act provided that suit could be brought within 12 months after termination of enemy status. This British enactment has its parallel in the 1948 Judicial Code revision, discussed *infra*, pp. 50–52, which provided for an extension of the three-year grace period to "all legal disabilities actually barring suit."

See also THAYER, *The Effect of a State of War Upon Statutes of Limitation or Prescription*, 17 Tulane L. Rev. 416, 439.

are unavailable during war is deducted from the statute of limitations, that case must be taken to have originated the principle here relied upon. Petitioner cites the case of *Hopkirk* v. *Bell*, 3 Cranch 454, to support the statement that "this principle has its origin in the time of the American Revolution" (Pet. Br. II, p. 25). But that case had an entirely different holding. The Court there held that the Treaty of Peace between Great Britain and the United States of 1783, which provided that British creditors should meet with no legal impediment in this country in enforcing their claims, prevented the operation of the Virginia statute of limitations upon British debts contracted before that treaty. The holding was that, under the treaty, all statutes of limitations on claims not previously barred began to run again on the date of the treaty. Under the construction placed upon the treaty, time that had elapsed prior to the Revolutionary War was not counted at all.

There is apparently no case either in England or the United States prior to the adoption of the Court of Claims statute which held that the statutory period would automatically be extended for persons unable to sue because of war. It is difficult to understand how Congress could have intended the statute to be subject to a common law exception which did not exist at the time of its enactment.

3. When Congress intends a period of limitations to be extended because of war, it says so expressly

That Congress did not believe there was any general common law rule suspending all statutes of limitations, as between opposing belligerents, is sup-

ported by the special legislation passed during the Civil War suspending statutes of limitations because of the war. In 1864 Congress specifically provided that the statute of limitations would not run against the plaintiff who could not obtain access to a court (including the Court of Claims), or service on the defendant because of the Civil War. 13 Stat. 123.[12] In the same year, Congress passed legislation providing for suspending the time limitation on presenting claims under the preemption laws during the military service of the claimant. 13 Stat. 35. And in 1867, just prior to the decision in *Hanger* v. *Abbott*, Congress passed legislation extending the time limits for serving out writs of error or appeal in the Federal courts as to an action in any court closed by the Civil War. 14 Stat. 545.

Thus, at the very time when Congress adopted the Court of Claims statute, it was aware of the problem posed by limitation periods during wartime. It dealt with that problem then, as it has since, by special legislation.

Again, in the Trading with the Enemy Act of 1917, Congress suspended limitations in actions involving property situated in enemy countries. 40 Stat. 418. In February 1920, Congress also expressly legislated that all statutes of limitations would be suspended in suits against the railroads during the period of government seizure in World War I. 41 Stat. 461.

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[12] There is reason to believe that the Court relied on common law principles in *Hanger* v. *Abbott*, rather than on this statute because of doubts as to the statute's retroactive validity. These doubts were later resolved. *Stewart* v. *Kahn*, 11 Wall. 493.

Yet, when Congress enacted the Suits in Admiralty Act, nine days later, it did not include a provision for a wartime suspension of the limitation in that statute. 41 Stat. 525, 526.

Finally, during the period of the Second World War and its aftermath, Congress enacted the National Service Life Insurance Act (54 Stat. 1008), and the Federal Tort Claims Act (60 Stat. 842), providing for limitations on suits against the Government without including wartime suspension provisions, as well as the Soldiers' and Sailors' Civil Relief Act (54 Stat. 1178, 1181, 1190), the Wartime Suspension of Limitations Act (56 Stat. 747; 62 Stat. 683, 828), and an amendment to Section 34 of the Trading with the Enemy Act, as amended (60 Stat. 925), all of which provided for suspension of limitation provisions because of war.[13] Congress, if it had wished, in enacting what is now 28 U. S. C. 2501 or in the many amendments to that statute, could have provided for wartime suspension of limitations, as it has in many other enactments. In consenting to be sued on contracts in the Court of Claims, it did not do so.

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[13] The Soldiers' and Sailors' Civil Relief Act of 1940 (50 U. S. C. App. 501, 525, 573) provided for suspension of limitations in suits by or against servicemen, as well as in tax collection suits against servicemen, during the period of military service. The Wartime Suspension of Limitations Act (18 U. S. C. 3287) suspended limitations governing criminal actions for frauds against the Government during the war period. Section 34 of the Trading with the Enemy Act, as amended (50 U. S. C. App. 34 (a)) suspended limitations in suits against the Alien Property Custodian respecting vested property.

4. The rule of construction sought by petitioner would subject to indefinite extension every statute conferring a limited consent to sue the United States

Petitioner contends that the implied exception in favor of persons to whom war closes the courts "is always read into the limiting clause of all Statutes of Limitations" (Pet. Br. II, p. 38). This contention with its obviously far-reaching implications is forced upon him because there is nothing in the language or the history of the Court of Claims statute suggesting that it should be construed differently from other federal limitations. Quite the contrary, the statute here involved is perhaps the most difficult one in which to find a Congressional intent for an implied exception for war, since it was adopted before there was such an implied exception in any statute.

Since petitioner can find nothing in the statute or its history to support his contention, he is reduced to the assertion that his equities are so great that Congress "must have" intended an exception to meet his situation. It should be noted parenthetically that, if petitioner's case is a test of the equities, he did not file suit in the Court of Claims until more than five years and seven months after the end of the war. It is difficult to see how the war was responsible for his failing to meet the time limitations.

Furthermore, the statute provides a grace period covering all legal disabilities actually barring suit,[14] and in this sense is more liberal than the other stat-

[14] Petitioner argues (Pet. Br. II, pp. 30–37) that his inability to file suit during the war years was not a legal disability in the statutory sense. This contention is discussed below.

utes in which the United States has consented to be sued. For example, in statutes dealing with governmental or private tort liability, and the time limitations thereon, Congress has not seen fit to include any disability provision. Neither the Suits in Admiralty Act, 47 Stat. 420, 46 U. S. C. 745; the Public Vessels Act, 43 Stat. 1112, 46 U. S. C. 782; the Jones Act, 41 Stat. 1007, 46 U. S. C. 688; the Carriage of Goods by Sea Act, 49 Stat. 1207, 1208; nor even the Federal Employers' Liability Act, 53 Stat. 1404, 45 U. S. C. 56, contains disability provisions. Moreover, the courts have rejected attempts judicially to engraft those acts with disability extensions. See *Sgambati* v. *United States,* 172 F. 2d 297 (C. A. 2), certiorari denied, 337 U. S. 933; *Williams, et al.* v. *United States, et al.,* 228 F. 2d 129 (C. A. 4), certiorari denied, 351 U. S. 986; *Kalil* v. *United States,* 107 F. Supp. 966, 967 (E. D. N. Y.); *Wahlgren* v. *Standard Oil Co. of N. J.,* 42 F. Supp. 992, 993 (S. D. N. Y.).[18]

It is clear that petitioner can make no case for a special equity requiring an exception to the limited

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[18] The foregoing cases all deal with actions brought under the Suits in Admiralty Act, Public Vessels Act, Jones Act. The following cases, construing the limitations provisions of the Federal Employers' Liability Act, have denied disability extensions for any reason. *Damiano* v. *Penn. R. Co.*, 161 F. 2d 534 (C. A. 3), certiorari denied, 332 U. S. 762; *Bell* v. *Wabash Ry. Co.*, 58 F. 2d 569 (C. A. 8); *Frabutt* v. *New York, C. & St. L. R. Co.*, 84 F. Supp. 460 (W. D. Pa.); *Alvarado* v. *Southern Pac. Co.* (Tex. Civ. App.) 193 S. W. 1108; *Jordan* v. *Baltimore and Ohio R. Co.*, 135 W. Va. 183, 62 S. E. 2d 806; *Wichita Falls & S. R. Co.* v. *Durham*, 132 Tex. 143, 120 S. W. 2d 803; *Wade* v. *Franklin*, 51 Ohio App. 318, 200 N. E. 644; *Gauthier* v. *Atchison, T. & S. F. Ry. Co.*, 176 Wis. 245, 186 N. W. 619; *Bement* v. *Grand Rapids & Ind. Ry. Co.*, 194 Mich. 64, 160 N. W. 424.

consent granted by this particular statute. He *must* argue that a special exception for war is imposed in every time limit contained in a Federal consent statute. Statutes providing for suits for tax refunds, tort actions, suits under the Alien Property Act and limitations governing actions respecting patents, government property, and commercial paper, all must be subject to an implied extension for war, if any one is. But there is no justification for such a construction in statutes which do not expressly provide for it in waiving the sovereign's immunity from suit.

The suggestion, for example, that during war a general principle of common law announced before *Erie* v. *Tompkins* allows an indefinite time in which to sue for a tax refund under 26 U. S. C., Supp. III, 6511, should at the very least give pause, in view of the complex scheme of rights and remedies provided by Congress in the Internal Revenue Code. Once admit the applicability of the principle, however, there is nothing in the language of either the statute here involved or in 26 U. S. C., Supp. III, 6511 to justify reading a war exception into one provision, but not the other. This observation is equally applicable to many other governmental consents to suit.

Moreover, from time to time throughout the period in which Congress has consented to be sued, Congress has dealt by explicit language with the problem created by war and periods of limitation. We have shown that where Congress intended an exception to the statute of limitations, it provided it. *Supra*, pp.

39–41. Petitioner would require Congress, if it wished to avoid the construction which it urges here, to provide expressly in each statute that the time limitation within which suits against the United States must be filed is *not* to be extended by war. But, in view of the well-recognized principle that no suit can be brought against the sovereign except to the extent and on the terms provided for by statute, Congress was entitled to assume that no implied broadening of the consent would be read into statutes establishing a time limitation for suits against the United States.

5. *The Court has already construed this statute as not permitting the six-year period of consent to be extended, although the court was closed to a claimant as a consequence of war*

The question here involved has, we submit, been decided by this Court. In *Kendall* v. *United States*, 107 U. S. 123, this Court, construing the Court of Claims statute in effect prior to 1948, which for these purposes is identical with the present statute, held that a disability based on an enemy status could not extend the six-year period by implication. The plaintiff in *Kendall* had filed a petition in 1872, six years and eleven months after his claim had accrued. During a portion of this time the Civil War was still in progress. Like petitioner here, Kendall pointed out that because of the war and wartime legislation the Court of Claims was closed to him, and contended that he should be allowed a full six years in which the court was open (107 U. S. at 125):

> His specific contention is, that within the true meaning of the statute his claim was not cognizable by the Court of Claims, and did not ac-

crue, until he was in such position that he could invoke its jurisdiction.

The court was closed to Kendall between January and April 1866 because of the Civil War legislation (12 Stat. 255, 257) prohibiting communication with citizens of rebellious states and thereafter until December 1868 because of the statute adopted during the Civil War denying access to the Court of Claims to those who aided or abetted the Confederacy. The court was first opened to Kendall by the General Amnesty Proclamation of December 25, 1868.[16]

Like petitioner in this case, Kendall filed suit more than six years after his cause of action accrued and more than three years after the Court of Claims was open to him. Like petitioner here, he did not argue that he should be given the benefit of the three-year period of grace for those who had been under specified disabilities; as with petitioner here, that would have done him no good, even if the then specified disabilities had been extended to cover his situation. Like petitioner here, he urged that where the court was closed to him as a consequence of the war and wartime legislation, the Court of Claims statute should be read as assuring him a total of six years during which the court would be open to him. Compare 107 U. S. at 125 with petitioner's brief, Part II, p. 45.

[16] Kendall's cause of action accrued on December 31, 1865, prior to the termination of the Civil War on April 2, 1866 (see *Brown* v. *Hiatts*, 82 U. S. 177). Between those dates, he presumably was under disability as a supporter of the Confederate States by virtue of the Congressional prohibition against commmunication with citizens of rebellious states in the Act of July 13, 1861 (12 Stat. 255, 257, as extended by the Act of July 2, 1864, 13 Stat. 375, 376).

This Court declined to strain the statute as requested by Kendall, and as requested here by petitioner. It found no exception to the six-year period for those to whom the court was closed because of war or enemy status. The Court said (107 U. S. at 125):

> We said in *McElrath* v. *United States*, 102 U. S. 426, that the government could not be sued except with its consent, and that it may restrict the jurisdiction of the Court of Claims to certain classes of demands. The acts in question do contain restrictions which that court may not disregard. For instance, where it appears in the case that the claim is not one for which, consistently with the statute, a judgment can be given against the United States, it is the duty of the court to raise the question whether it is done by plea or not. To that class may be referred claims which are declared barred if not asserted within the time limited by the statute. What claims are thus barred? The express words of the statute leave no room for contention. *Every claim*—except those specially enumerated—is forever barred unless asserted within six years from the time it first accrued. And that there might be no misapprehension as to the intention of Congress, the statute, after enumerating the cases to which the limitation of six years should not apply, declares that "no other disability than those enumerated shall prevent any claim from being disbarred." * * *

That the plaintiff was, "by reason of his connection with the rebellion," unable to comply with the terms upon which "the government had consented to be sued

in the Court of Claims," the Court held, "is his misfortune, and cannot have the effect of enlarging the time fixed by the statute of limitation." The Court continued (107 U. S. at 126):

> His remedy, if the claim be a valid one, is to apply to the legislative department of the government. *The courts cannot, in view of the language of the statute, exclude from computation, on the issue of limitation, the time intervening* between the accruing of the claim in 1865 and the promulgation of the amnesty proclamation. [Emphasis added.]

"In view of the language of the statute," this Court held that it would not imply an extension to the consent to suit granted by that statute in favor of one who was barred from bringing suit, as a matter of law, because of his enemy status.[17]

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[17] There are, of course, certain factual differences between Kendall's situation and petitioner's. Kendall was within the United States, not overseas; during the greater part of the time, he could not bring suit because he could not take an oath due to his enemy status, not because he was then technically an enemy for all purposes. But such differences do not go to the root of the question here involved, and do not distinguish the *Kendall* decision from this case. Kendall, like the present petitioner, could not bring suit, because by virtue of Civil War trading with the enemy legislation and the wartime Court of Claims statute he was regarded prior to the amnesty as an enemy of the United States, *i. e.*, one who could not truthfully take an oath of allegiance. Similarly, petitioner by virtue of public law principles and the Trading with the Enemy Act of 1917 was technically an "enemy" of the United States while he remained under Japanese control. Hence, the two cases present the same issue: whether the Court of Claims statute is suspended during a claimant's inability to bring suit because of an enemy status imposed by law.

The *Kendall* opinion was prepared by Mr. Justice Harlan speaking for a unanimous Court in 1882 during the floodtide of the post-Civil War litigation in which the Court had repeatedly held state statutes of limitations suspendible during the period of hostilities (see *supra*, pp. 22–26). The contrast in inescapable. The Court, recognizing the jurisdictional character of the Court of Claims statute (107 U. S. at 125), refused to imply an exception to the Congressional consent for war since the "express words of the statute leave no room for contention" that all claims except those specified were barred after six years.

C. THE PRESENT STATUTE IS IN NO WAY INEQUITABLE SINCE IT MAKES EXPRESS PROVISION FOR THOSE WHOSE CLAIMS ACCRUE WHILE THEY ARE DENIED ACCESS TO THE COURTS BY WAR

Petitioner argues that a suspension for "war" must be read into 28 U. S. C. 2501 because without such a provision the statute would completely bar those persons against whom the courts are closed by war or hostilities during the limitation period. The statute provides, however, that persons under legal disabilities actually barring suit have an additional three years in which to sue after the courts are again open to them. This period of grace applies equally to those to whom the courts are closed because of their enemy status and to those under other legal disabilities. Petitioner did not avail himself of this grace period, but chose to wait over five years after the courts were open to him before prosecuting his claim. Hence, his suit is barred.

1. *The saving clause of the Court of Claims statute of limitations applies to all legal disabilities actually barring suit*

We have shown that the Court of Claims limitation provision contains a flat prohibition against suits against the Government more than six years after a claim or cause of action arises or accrues, and that no exceptions can be read into the plain and unambiguous language of the statute. Congress, in this same provision, however, has provided an express remedy for those who for no fault of their own are subject to a disability which is recognized by law as limiting or affecting their jural capacities, and hence their ability to take action to protect their legal rights.

The present statute, which was enacted as part of the Judicial Code revision in 1948 (28 U. S. C. 2501) and was in effect when this suit was brought, provides that:

> A petition on the claim of a person under legal disability or beyond the seas at the time the claim accrues may be filed within three years after the disability ceases.

This provision, in unequivocal language, allows persons whose claims accrue while under legal disability three years in which to bring suit after termination of that disability.[18] The Reviser's Notes on 28 U. S. C. 2501 in the 1948 Code revision state that "the revised language will cover all legal disabilities actu-

[18] Since the existing statute was in effect when the suit was brought, it governs this action, for Congress has the power at any time to withdraw or modify its consent to suit. See *Bruner* v. *United States*, 343 U. S. 112; *Cummings* v. *Deutsche Bank*, 300 U. S. 115. Cf. *Campbell* v. *Holt*, 115 U. S. 620. The existing

ally barring suit" and that a provision excluding disabilities other than those specifically mentioned in the earlier statute had, in view of this fact, been eliminated "as superfluous." [19] On its face, the language of the

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statute is a revision of a former provision (28 U. S. C. 262, 1946 Ed.) which stated:

"Every claim against the United States cognizable by the Court of Claims shall be forever barred unless the petition setting forth a statement thereof is filed in the court, or transmitted to it by the Secretary of the Senate or the Clerk of the House of Representatives, as provided by law, within six years after the claim first accrues. The claims of married women first accrued during marriage, of persons under the age of twenty-one years first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the petition be filed in the court or transmitted, as aforesaid, within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively."

[19] The full text of the Reviser's Note is as follows:

"Words 'a person under legal disability or beyond the seas at the time the claim accrues' were substituted for 'married women first accrued during marriage, of persons under the age of twenty-one years first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued; entitled to the claim.' The revised language will cover all legal disabilities actually barring suit. For example, the particular reference to married women is archaic, and is eliminated by use of the general language substituted.

"Words 'nor shall any of the said disabilities operate cumulatively' were omitted, in view of the elimination of the reference to specific disabilities. Also, persons under legal disability could not sue, and their suits should not be barred until they become able to sue. Similar sections of the U. S. Code do not contain any such provision. For example, see section 502 of Title 28 U. S. C., 1940 Ed., incorporated in section 544 of this title. (Footnote continued on next page.)

new exception is broad enough to include a disability imposed on petitioner by an enemy status,[20] and the Reviser's Note demonstrates that it should be given its literal meaning to cover any legal disqualification for bringing suit. This Court has recognized the "authoritative" character of Reviser's Notes, and that the 1948 revision of the Judicial Code, although attempting to avoid revisions of a "controversial nature," made many substantial changes in the Code. *Ex parte Collett*, 337 U. S. 55; *United States* v. *National City Lines*, 337 U. S. 78. See also H. Rept. 1559, 80th Cong., 2d Sess., reprinted following 28 U. S. C. A. 2680; and *Moore's Commentary on the Judicial Code*, pp. 71–84.

2. *The Trading With the Enemy Act imposed a legal disability on petitioner during the period of the Japanese occupation of the Philippines*

Section 3 of the Trading With the Enemy Act of 1917 (50 U. S. C. App. 3; Pet. Br. II, pp. 3–4)

"The section was extended to include claims referred by the head of an executive department in conformity with section 2510 of this title. 80th Congress House Report No. 308." See text following 28 U. S. C. A. 2501.

The comment on the elimination of the references to other disabilities is from the Reviser's Note to the identically-worded revision of 28 U. S. C. 2401. The revisers made another substantive change in the limitation provision in eliminating, for reasons of policy, the prohibition against cumulative disabilities.

[20] That the effect of war in closing the courts subjects an enemy litigant to a "disability" has been repeatedly recognized by this Court in suits between private parties. *Semmes* v. *Hartford Insurance Co.*, 13 Wall. 158, 160 ("legal disability created by war"); *Levy* v. *Stewart*, 11 Wall. 244, 250 ("disability"); *Brown* v. *Hiatts*, 15 Wall. 177, 185 ("disability"); *Ross* v. *Jones*, 22 Wall. 576, 586 ("disability"); *Caperton* v. *Bowyer*, 14 Wall. 216, 236 ("disability").

prohibits during time of war any form of communication or intercourse between any person within the United States and an enemy, including a person residing in enemy-occupied territory.

On March 18, 1942, the Treasury Department issued, under the authority of the Trading With the Enemy Act, General Ruling No. 11 (7 F. R. 2168), which designated "that portion of the Philippine Islands occupied by Japan" as "enemy territory," stated that all individuals within such territory were "enemy nationals," and prohibited trade or communication with such persons. Petitioner admits that he was subject to the Act during the period of the Japanese occupation, and could not have lawfully brought an action in any American court, at least from that date on (Pet. Br. II, pp. 23–28). For "trade or communication" as defined in the Ruling included dealings pertaining to property, evidences of indebtedness, or contracts, and any writing, message "or other communication of any nature whatsoever."

A prohibition of this type issued pursuant to a Federal statute is clearly a legal disability actually barring suit within the meaning of 28 U. S. C. 2501, and petitioner therefore was not without a remedy because he could not sue in the Court of Claims during the Japanese occupation. For any claim arising while he was disabled from suing in American courts, the statute provided a three year grace period following the end of the occupation in which suit

could be brought, a period longer than many statutes of limitation."

The Court of Claims has so held in *Compania Maritima* v. *United States*, No. 50165, decided November 7, 1956. Petitioner attacks the validity of this holding (Pet. Br. II, pp. 30–38) in order to provide a basis for his contention that an exception must be read into the six-year period to avoid hardship to persons barred by hostilities. In the first place, petitioner is hardly in position to challenge a liberal interpretation of the statute solely because that interpretation undermines his own allegations of unfairness. Moreover, as petitioner, under the Court of Claims decision, had three years following the end of hostilities in which to prosecute his claim, he can hardly urge that 28 U. S. C. 2501 as applied to him was so unreasonable or unconscionable that the six-year period in his case must be lengthened by implication.

Petitioner argues, however (Pet. Br. II, pp. 37–38), that the present language of the statute works a hardship on those whose claims accrue prior to the outbreak of hostilities, since they are not entitled to the grace period. Petitioner's claims accrued during the Japanese occupation as did that of the plaintiff in *Compania Maritima, supra*. The short answer to this contention, however, is that the same handicap is placed on persons suffering under other types of

[21] There is no reason apparent on the record why petitioner could not have filed his petition during the three-year period following the liberation of the Philippines ending in September 1948. (It should be noted that his claim had been denied by the Army Claims Service on June 21, 1948.)

legal disability who, although they may be entitled to sue through a legal representative, are often unable to do so as a practical matter while still disabled, as well as on persons to whom the courts may be open and who are actually, although not legally, disabled from bringing an action. *McDonald* v. *Hovey,* 110 U. S. 619; *McIver, et al., Lessees* v. *Ragan,* 2 Wheat. 25.

D. ANY EXTENSION OF A STATUTORY CONSENT OF THE UNITED STATES TO BE SUED SHOULD BE ACCOMPLISHED BY LEGISLATION, NOT BY THE CREATION OF A JUDICIAL EXCEPTION FOR "WAR"

Petitioner concedes that there is nothing in the language of the statute here involved which lends the slightest support to his position. He is urging the Court to find an implied exception, not because of the language, but in spite of the language of the statute. It is submitted that this Court cannot find that the time limitation imposed in the statute in which the sovereign consents to be sued is indefinitely extended by a common law or implied exception. It is also submitted that such a decision would be inconsistent with the firmly established rule of law referred to many times by this Court that the sovereign can only be sued to the extent and upon the terms to which the legislature has agreed.

Assuming, however, that this Court were free to create a judicial exception to the statute, we suggest that it would serve no useful purpose to do so. A judicial exception for persons who are prevented by war or war legislation from filing suits against the United States would not solve the problem as well as it can be solved—and in fact has been solved—by legislative action. Whatever reason may have com-

pelled the Court in 1867 to take no notice of the recently passed legislation suspending the statute of limitations and to announce a new doctrine based on common law principles accomplishing the same result, there is no reason this Court should depart from the 1948 revision of the Judicial Code which provided a three-year period of grace for those like petitioner under legal disability which prevented suit. Whatever the problem which confronted the Court at that time, the problem today is different.

In 1867 an implied exception to state statutes of limitation for the period of the Civil War helped a nation knit itself back together by resuming its commercial relationships where they had been broken off. Today a Court decision extending, where there was "war," the six-year period in which the United States has consented to be sued in the Court of Claims would not only create serious problems in other statutes but would fail to meet the twentieth century problem of foreign and American claimants who have been denied access to the court through no fault of their own.

Today "war" is not the well-defined concept it was thought to be during the last century. The technical status of war and open hostilities are rarely coextensive. The "cold war," with internment and restrictions on travel, is a far greater obstacle to filing a timely suit than many earlier "wars." Because of the "cold war," large numbers of people are not free either to reach the United States, or to communicate with it. The recent fighting in Budapest and Port Said in which the United States was not involved was probably a more real interference with the opportunity of

a resident there to communicate with the United States than conditions in Manila in the summer of 1945, a period which petitioner insists must be added to the six-year time limitation allowed by statute. These uncertainties disclose the inadequacy of any judge-made general exception to deal with the twentieth century problem; it would be difficult to set the limits of a judicial exception read into this statute. Certainly, in the light of today's problems, this Court would hesitate to make it turn on whether there was a technical status of "war." A test of actual hostilities would seem more realistic. But actual hostilities would not cover all the time which petitioner here seeks to have added to his statutory six-year period, nor would it cover the case of those prevented by other forms of governmental action from bringing suit. And there is no conceivable basis for this Court's finding an implied exception to the statutory period for claimants in that category.

The matter is one for legislative treatment. Congress has already extended the three-year disability provision to benefit anyone who is under a legal disability actually barring suit. This has been construed, and we believe rightly, to cover those who like petitioner could not legally bring suit during the war. This Court has already indicated that in deciding who can bring suit in this country during a war it will look to the definition of enemy in the Trading With the Enemy Act. *Ex parte Colonna,* 314 U. S. 510, 511. This statute, and the rulings and orders under it, provide an element of certainty in deciding who could and who could not legally bring suit in the United

States and for what periods they were precluded. Such certainty would be conspicuously lacking in a general common law exception for war judicially implied in all governmental periods of limitation.

Following the 1948 Judicial Code revision, the only category of claimants not entitled to a grace period were those who, by physical circumstances beyond their control, could not reach the court during the six years allotted them. In this connection, it must be remembered that petitioner is not contending that he was prevented by war from timely filing suit. He did not file suit until more than five years and seven months after the end of World War II. He is contending that he must as a matter of law be allowed a period of six years during no part of which was he prevented from filing suit. But the regular six-year period was deliberately made long enough to take care of the various circumstances which might prevent claimants for a period of months or even of several years from filing suit.[22] If Congress should consider that the present statute does not go far enough, there is room for legislative action.

In summary, it is believed that there is no basis for this Court's reading into the statute in which the United States consented to be sued the implied exception requested by petitioner. It is submitted that

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[22] Petitioner seeks a special implied exception to take care of him, who filed in April 1951, but which would not take care of those other numerous Philippine claims which were filed in October 1951 and thereafter. Even accepting petitioner's position, it would require legislative action to allow the Court of Claims to consider such petitions.

such an exception would serve no useful purpose. It would cast doubt and uncertainty into all Federal statutes prescribing definite time periods within which certain action must be taken and would fail to deal with the general problem presented by those unable to reach the courts through no fault of their own, a class of persons not including the present petitioner who failed to file suit until more than five and a half years after the war.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that, should the Court reach the question, it should find that petitioner's claim is barred by time and that the judgment of dismissal below should be sustained.

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DECEMBER 1956.

APPENDIX

PETITIONER'S LETTER REQUESTING THE COURT TO RECEIVE BRIEFS AND HEAR ARGUMENT ON WHETHER THE CLAIM IS BARRED BY TIME

NOVEMBER 7, 1956.

In re *Jose Soriano* v. *The United States,* October Term, 1956—No. 49

The CLERK,
The SUPREME COURT OF THE UNITED STATES,
Washington, D. C.

DEAR SIR: The decision of the United States Court of Claims of this day in *Compania Maritima* v. *United States,* C. Cls. No. 50165, is being called to the attention of this Court because of its possible effect upon *Jose Soriano* v. *United States,* on the November Calendar for argument November 15, 1956.

In 1952, in *Marcos* v. *United States,* 102 F. Supp. 547, the United States Court of Claims held that, in claims against the United States for payment on account of requisitions of recognized, organized guerrillas in the Philippines during the War against Japan (1) the statute of limitations was suspended from the date of a requisition made after December 7, 1941, until September 2, 1945, the date of the surrender of Japan; (2) the general six-year statute of limitations applied and not the three-year statute of limitations relating to disabilities; and (3) claims filed in the United States Court of Claims prior to September 2, 1951, were timely filed and within its jurisdiction.

Shortly thereafter, the decision in *Victorio* v. *United States,* 106 F. Supp. 182, to the effect that the

Court of Claims had jurisdiction of such claims became the law of that Court—a decision reversed in *Logronio* v. *United States,* 133 F. Supp. 395, upon the basis of which that Court dismissed the claim of *Soriano* v. *United States,* which is now the subject of review by this Court.

On November 7, 1956, the United States Court of Claims reversed its decision in the Marcos case, *supra,* in *Compania Maritima, supra,* holding that war does not suspend the statute of limitations, but is a disability, and that the three-year statute of limitations relating to disabilities applies from September 2, 1945, when the disability, *War,* ended, and not the six-year statute of limitations. Two judges dissented.

The petition in *Soriano* was filed April 26, 1951, more than three years, but less than six years, thereafter, i. e., September 2, 1945.

This decision is in clear conflict with many decisions, including such decisions arising out of World War II as *Osbourne* v. *United States,* 164 F (2) 767, *Salvoni* v. *Pilson,* 181 F (2) 615 (Cir. Ct. D. C.), cir. den. 339, U. S. 981, and *Chuchuru* v. *Chutchurru,* 185 F (2) 62, (Cir. Ct. 10th Cir.).

Respondent, in *Soriano* v. *United States,* raised the question of the statute of limitations as an affirmative defense. There was no occasion to raise or argue that issue in this Court, as the Court below had not passed upon it in the subject case, as petitioner was considered by the Court of Claims to have filed a timely claim, as the law *then* stood, and the claim had been dismissed on other jurisdictional grounds. Had the Court of Claims held, in the subject case, as it *now* holds, respecting the statute of limitations, such decision would have been an additional grounds for the granting of the Petition for Writ of Certiorari and would now be subject to the consideration of this Court.

Would the Supreme Court consider:—

(1) Postponing the date of argument in the *Soriano* case for a short period of time, permit the filing of briefs and argument on the additional question of the statute of limitations applicable in the subject case and grant an additional fifteen minutes of time to each party for argument on this subject; or, in the alternative,—

(2) Permit the filing of briefs on the question of the statute of limitations *after* the argument in *Soriano* and the submittal of that question on the briefs?

Of the three affirmative defenses raised by respondent, the first is a question of fact to be determined in a trial on the merits, respondent having the burden of proof; the second is the subject of the present review; and the third is the question of the statute of limitations.

A decision on the question of the statute of limitations would dispose of all legal questions in the subject and related cases. If it is not disposed of in the *Soriano* case, the law of the Court of Claims will require the petitioner, if successful in the present review, to again petition this Court for a writ of certiorari, by reason of the clear conflict with the above cited decisions of the United States Circuit Courts of Appeals for the Second and Tenth Circuits and the District of Columbia. If the Court should decide the question on its own motion, by reason of the fact that it is an issue presented by the pleadings and that jurisdiction of the United States Court of Claims is involved, the Court will not have had the views of the petitioner on this subject, but only the views of respondent, as expressed by the Court of Claims, unless one of the two alternatives above be acceptable to this Court.

Petitioner requests the opportunity to file a brief upon the subject to aid the Court in its decision, rather than have the Court decide this question on its own motion, as it did in *Blake* v. *United States,* 14 C. Cls. 462, affd. 103 U. S. 227, 237, or have the decision in *Compania Maritima* influence in any way its decision on the fundamental issue in the *Soriano* case, i. e., whether the United States is liable for requisitions of organized recognized guerrillas for military operations in the Philippines made in the name of the United States Armed Forces.

Respectfully,

PLEW SAVOY,
Attorney for the Petitioner.

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